UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:24-CR-20562
Honorable Brandy R. McMillion

-v-

SHAWN PATRICK SMITH,

Defendant,
_____/

NOTICE OF INTENT TO INTRODUCE RULE 404(b) EVIDENCE AT TRIAL

COMES NOW the United States of America, by and through its undersigned attorneys, and hereby files its notice[1] of intent to introduce evidence at trial pursuant to Rule 404(b) of the Federal Rules of Evidence.

The following evidence will show the defendant's intent, plan, knowledge, and absence of mistake or lack of accident:

(1) The defendant failed to timely file federal income tax returns for himself for the tax years 1995 through 2016 and 2018 through 2020; and

[1] This notice is in keeping with recently promulgated Fed. R. Evid. 404(b)(3) which requires notice on the part of the government of the evidence it intends to offer at trial and the permitted purpose for which the government intends to offer the evidence.

(2) The defendant failed to report a substantial portion of the gross receipts from his law practice on his 2016 tax return.

The Evidence is Admissible under Rule 404(b).

Rule 404(b) permits evidence of other acts to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident." Fed. R. Evid. 404(b)(1)-(2). When determining whether to admit "other acts" evidence under Rule 404(b) in the Sixth Circuit, a court must consider: (1) "whether there is sufficient evidence that the other act in question actually occurred;" (2) "whether the evidence of the other act is probative of a material issue other than character;" and (3) "whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect." United States v. Emmons, 8 F.4th 454, 474 (6th Cir. 2021) (internal quotes omitted).

A. There is Sufficient Evidence that the Other Acts Took Place.

As to the first prong of the Rule 404(b) analysis, the Supreme Court held that "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and the defendant was the actor." Huddleston v United States, 485 U.S. 681, 689 (1988). In this case, the evidence is easily sufficient to establish that the defendant failed to timely file several years of federal individual income tax returns as shown in the following table.

Tax Year	Due Date	Date Filed	Days Late
1995	8/15/1996	10/2/1996	48
1996	10/15/1997	9/21/1998	341
1997	10/15/1998	1/5/2000	447
1998	10/15/1999	2/21/2002	860
1999	8/15/2000	3/18/2003	945
2000	8/15/2001	4/9/2004	968
2001	8/15/2002	7/10/2006	1425
2002	8/15/2003	2/20/2007	1285
2003	4/15/2004	2/19/2007	1040
2004	10/15/2005	6/3/2008	962
2005	10/15/2006	Never Filed	Never Filed
2006	10/15/2007	8/26/2008	316
2007	10/15/2008	11/30/2010	776
2008	10/15/2009	2/15/2011	488
2009	10/15/2010	Never Filed	Never Filed
2010	10/15/2011	Never Filed	Never Filed
2011	4/15/2012	Never Filed	Never Filed
2012	4/15/2013	Never Filed	Never Filed
2013	4/15/2014	Never Filed	Never Filed
2014	4/15/2015	Never Filed	Never Filed
2015	10/15/2016	11/30/2017	411
2016	10/15/2017	11/30/2017	46
2017	10/15/2018	10/15/2018	On Time
2018	10/15/2019	7/18/2022	1007
2019	10/15/2020	7/18/2022	641
2020	10/15/2021	7/18/2022	276

The government will prove that the defendant failed to timely file the earlier returns at issue by offering certified IRS records for the pertinent years. To

establish the false 2016 tax filing by the defendant, the government will offer the pertinent return along with the testimony of the same IRS Revenue Agent who will testify as to the charged returns. The Revenue Agent will testify that she determined the gross receipts for Smith's law firm for the year 2016 to be approximately $1,115,850 using the bank deposits method of proof, but that Smith reported only $870,008 of gross receipts on his tax return. Thus, there will be ample evidence to support a conclusion by the jury that the defendant failed to timely file earlier tax returns and failed to report about $245,842 of gross receipts for 2016.

B. The Other Acts Evidence is Offered for A Proper Purpose

This Court should allow the evidence that, in the past, Smith failed to file timely returns and failed to report a substantial amount of his gross receipts because Rule 404(b) is "a rule of inclusion rather than exclusion," only prohibiting the use of extrinsic evidence to prove character yet permitting its use for various other purposes. United States v. Blankenship, 775 F.2d 735, 739 (6th Cir. 1985).

Evidence is admissible under Rule 404(b) to prove intent if, as here, specific intent is a statutory element of the offense. See United States. v. Spikes, 158 F.3d 913, 930 (6th Cir. 1998.) To convict the defendant on the tax charges in this case, the government must show the specific intent of "willfulness;" that is, proof

beyond a reasonable doubt that the defendant acted voluntarily and intentionally to violate a known legal duty. Cheek v. United States, 498 U.S. 192, 201 (1991).

Indeed, tax offenses are "one of the few areas where the Supreme Court has held that ignorance of the law is a defense." United States v. Abboud, 438 F.3d 554, 581 (6th Cir. 2006). Therefore, the government should be allowed to introduce evidence pursuant to Rule 404(b) to prove that the defendant acted with the requisite state of mind. See United States v. Lattner, 385 F.3d 947, 957 (6th Cir. 2004).

The proposed evidence is very probative of the defendant's state of mind. It tends to show that, when he failed to file tax returns and filed falsely as charged, he was doing so "voluntarily and intentionally." Cheek, 498 U.S. 201. Specifically, the noticed evidence regarding the defendant's history of failing to file tax returns shows that the charged failures to file were part of his plan, that he knew what he was doing, and that the failures did not result from mistake or accident. Likewise, the fact that the defendant filed a 2016 tax return that failed to report over $200,000 dollars in gross receipts tends to show that, when he filed falsely in the same way for 2017-2020, he knew what he was doing, and that filing was not due to mistake or accident on his part.

The case law in this circuit is replete with examples of courts admitting uncharged tax misconduct to prove the defendant's willfulness with respect to

charged tax crimes. In United States v. Harris, the Sixth Circuit upheld the admission of evidence of the defendant's failure to file tax returns in a tax fraud case like this one. 200 F. App'x 472, 509 (6th Cir. 2006). In that case, the defense unsuccessfully objected at trial to the admissibility of evidence that the defendant failed to file returns for earlier years. The Court of Appeals held that the district court properly admitted the evidence because "the jury could reasonably infer that such a sustained streak of non-filing and nonpayment by [the defendants] reflected not a mistaken understanding of their duties under federal tax law, but an intent to shirk those duties." Id. at 510. The jury in the case of defendant Smith should be permitted the chance to reasonably infer likewise.

In the leading case of United States v. Middleton, the Sixth Circuit[2] declared "[i]t is well-settled that previously filed tax returns or other proof of prior taxpayer history is admissible, pursuant to Fed. R. Evid. 404(b), to establish a defendant's knowledge of a legal duty to pay taxes." 246 F.3d 825, 836 (6th Cir. 2001). Likewise, in United States v. Popenas, the Sixth Circuit held that prior year tax returns were properly admitted under Rule 404(b) to show a pattern of under-

[2] Other circuits have likewise held that in a tax case "a defendant's past taxpaying record is admissible to prove willfulness circumstantially." United States v. Bok, 156 F.3d 157, 165 (2d Cir. 1998); see also United States v. Daraio, 445 F.3d 253, 264-65 (3d Cir. 2006) (holding that evidence of defendant's prior tax noncompliance spanning nearly 14 years "admissible and relevant to prove willfulness" in tax evasion prosecution); United States v. Upton, 799 F.2d 432, 433 (8th Cir. 1986) ("Evidence of Upton's questionable compliance with tax laws, both in the years prior to and subsequent to 1980-81, is probative of willfulness in the present context.").

reporting income from which the jury might properly find willfulness. 780 F.2d 545, 548 (6th Cir.1985).

Beyond its ordinary burden to prove willfulness, the government here must also confront claims like inadvertence or mistake on the part of the defendant. The government should be permitted evidence that refutes such defenses. Such was the case in United States v. Johnson, where the Sixth Circuit allowed proof under Rule 404(b) "where there is thrust upon the government, either by virtue of the defense raised by the defendant or by virtue of the elements of the crime charged, the affirmative duty to prove that the underlying prohibited act was done with a specific criminal intent." 27 F.3d 1186, 1192 (6th Cir. 1994.) See also United States v. Ausmus, 774 F.2d 722, 727–28 (6th Cir. 1985) (district court properly admitted such evidence because it "demonstrates a pattern, plan, and scheme indicating that [defendant's] failure to pay his taxes in 1978, 1979, and 1980 was not the result of an accident, negligence, or inadvertence.")

Consistent with the cases in this circuit, evidence of the defendant's prior non-compliance with tax laws in years outside the scope of the indictment is probative of willfulness, which is "a material issue other than character" and thus satisfies the second prong of the admissibility test. United States v. Barnes, 822 F.3d 914, 920 (6th Cir. 2016). Therefore, evidence of the defendant's uncharged failure to timely file tax returns from 1995 through 2016, and 2018 through 2020,

is admissible under Rule 404(b), as is the fact that the defendant did not report a substantial portion of the gross receipts from his law practice for the tax year 2016.

C. The Probative Value of the Other Acts Evidence is Not Substantially Outweighed by the Danger of Unfair Prejudice

The final step of the analysis requires the court to apply Rule 403 and determine whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. The court has "very broad" discretion in determining whether the danger of undue prejudice outweighs the probative value of the evidence. United States v. Vance, 871 F.2d 572, 576 (6th Cir. 1989)(internal quote omitted.) While there will always be some potential prejudice to the defendant that may result from admitting other acts evidence, the question under Rule 403 is whether the possibility of unfair prejudice is so great that it outweighs the evidence's probative value.

In this case, the other acts evidence has great probative value. Such evidence is probative of intent when it relates to conduct that is "substantially similar and reasonably near in time to the offenses for which the defendant is being tried." United States v. Blankenship, 775 F.2d 735, 739 (6th Cir. 1985). Here the uncharged conduct is not just "substantially similar" but identical to the charged conduct. As for the "reasonably near in time" criterion, the evidence at issue concerns tax misconduct in the years just preceding those charged. See United

States v. Gordon, 493 Fed. Appx. 617 (6th Cir. 2012)(evidence that defendant underreported income on returns for previous years properly admitted.)

While it is highly probative, the evidence is not unfairly prejudicial. By "volume" the evidence will constitute only a very modest portion of the government's case in chief. Additionally, the other acts evidence the government has proffered is no more prejudicial than the evidence at issue in other cases where courts have admitted prior tax misconduct or false statements under Rule 404(b). See United States v. Abboud, 438 F.3d 554, 582 (6th Cir. 2006) (testimony regarding payroll tax fraud "was sufficiently succinct so as to minimize prejudice.")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2025, the foregoing was filed using the CM/ECF system which will notify counsel of record.

/s/ Jeffrey A. McLellan
JEFFREY A. MCLELLAN